Supreme Court, U.S.
FILED
JAN 14 1997
CLERK

No. 96-948

In The

Supreme Court of the United States

October Term, 1996

CHARLES R. BLANCHARD, SR. and
WEST LOUISIANA CRAWFISH PRODUCERS
ASSOCIATION, INC.,

Petitioners,

v.

WILLIAMS, INC. and ATCHAFALAYA
CRAWFISH CONSERVATION ASSOCIATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION

NEWMAN TROWBRIDGE, JR.
BIGGS, TROWBRIDGE, SUPPLE
AND CREMALDI
Post Office Drawer 565
Franklin, Louisiana 70538
Telephone: (313) 828-5480

*Attorney for Respondent,
Atchafalaya Crawfish
Conservation Association*

PATRICK G. TRACY, JR.
600 Jefferson St., Suite 910
Post Office Box 54001
Lafayette, Louisiana 70505
Telephone: (318) 266-2340

*Attorney for Respondent,
Williams, Inc.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

Atchafalaya Crawfish Conservation Association

Williams, Inc.

CORPORATE DISCLOSURE STATEMENT

Williams Land Company, L.L.C. and 44 Production Company, L.L.C are affiliates of Williams, Inc.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

Introduction 1

Statement of Facts 2

REASONS FOR DENYING THE WRIT 5

ARGUMENT AND AUTHORITIES 7

1. THERE IS NO RIGHT UNDER FEDERAL LAW TO CRAWFISH ON PRIVATELY OWNED SWAMPLAND ACCESSIBLE BY BOAT FROM NAVIGABLE WATERS. THE FIFTH CIRCUIT DECISION IN THIS REGARD IS CONSISTENT WITH A LONG HISTORY OF JURISPRUDENCE FROM THIS COURT 7

2. NO INDIVIDUAL FEDERAL RIGHTS ARISE UNDER THE "PUBLIC TRUST" OR "EQUAL FOOTING" DOCTRINE. MOREOVER, THAT DOCTRINE HAS NO APPLICATION TO VIRTUALLY ALL OF THE PROPERTY IN DISPUTE IN THIS LITIGATION WHICH WAS ACQUIRED BY THE STATE OF LOUISIANA, NOT BY RIGHT OF INHERENT SOVEREIGNTY UPON ADMISSION TO STATEHOOD, BUT BY GRANTS FROM THE UNITED STATES GOVERNMENT AS SWAMP AND OVERFLOWED LANDS OR LANDS OTHERWISE ABOVE THE LIMITS OF HIGH WATER, AND LATER CONVEYED BY LOUISIANA INTO PRIVATE OWNERSHIP 13

TABLE OF CONTENTS – Continued

Page

A. No Individual Federal Rights Arise Under the Public Trust or Equal Footing Doctrine..... 13

B. The Vast Areas of Swamp and Overflowed Lands In Which the Crawfishermen Claim Public Use Rights in This Proceeding Are Unaffected by the Public Trust Doctrine.. 16

3. THE ACT OF ADMISSION OF LOUISIANA INTO THE UNION RECOGNIZED MERELY THE RIGHT OF FREE PASSAGE UPON THE MISSISSIPPI RIVER AND OTHER IMPORTANT NAVIGABLE STREAMS AND WATERWAYS WHICH BECAME STATE-OWNED BY RIGHT OF SOVEREIGNTY IN 1812 AND ESTABLISHED NO FEDERAL RIGHT OR INTEREST IN SUCH WATERWAYS SAVE THAT SURRENDERED TO THE UNITED STATES GOVERNMENT UNDER THE CONSTITUTION..... 17

4. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO FISH ON PRIVATELY OWNED SUBAQUEOUS LAND, EVEN IF NAVIGABLE-IN-FACT TO COMMERCIAL CRAWFISHERMEN 20

5. THE RIGHT TO CRAWFISH IS A PROPERTY RIGHT INCIDENT TO THE OWNERSHIP OF THE LAND AND DOES NOT FOLLOW FROM ANY PUBLIC RIGHT OF PASSAGE ON WATERS, EVEN IF NAVIGABLE, WHICH MAY FLOW OVER PRIVATELY OWNED LAND.... 23

IV. CONCLUSION..... 28

TABLE OF AUTHORITIES

Page

JURISPRUDENCE

Amigo Enterprises, Inc. v. Gonzales, 581 So.2d 1082 (La. App. 4th Cir. 1991) 26

Appleby v. City of New York, 271 U.S. 364, 46 S. Ct. 569 (1926) 15

Barney v. Keokuk, 94 U.S. 324, 24 L.Ed. 224 (1877) 15

Boykin & Lang v. Shaffer, 13 La. Ann. 129 (1858) 20

Brown v. Rougon, 552 So.2d 1052 (La. App. 1st Cir. 1989) 26

Burns v. Crescent City Rod & Gun Club, 41 So. 249 (La. 1906) 19

California v. Sierra Club, 101 S. Ct. 1775 (1981) 20

Cardwell v. American Bridge Company, 113 U.S. 205, 5 S. Ct. 423 (1885) 19

Chauvin v. Louisiana Oyster Commission, 121 La. 10, 46 So. 38 (La. 1908) 17

Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926) 25

Dardar v. Lafourche Realty Company, Inc., No. 85-1015 (E.D. La. 1991), affirmed in part, vacated in part and remanded 985 F.2d 824 (5th Cir. 1993) 19, 26, 29

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977) 21

Edmiston v. Wood, 566 So.2d 673 (La. App. 2d Cir. 1990) 27

Escanaba Company v. Chicago, 107 U.S. 678, 2 S. Ct. 185 (1883) 19

TABLE OF AUTHORITIES – Continued

Page

Gibson v. United States, 166 U.S. 269, 17 S. Ct. 578, 41 L.Ed. 996 (1897) 20

Hampton v. Vicksburg, S & P.R., Co., 119 U.S. 280, 7 S. Ct. 206 (1885) 19

Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L.Ed. 428 (1891) 8, 23

Hoffman Homes, Inc. v. Administrator, U.S. E.P.A., 961 F.2d 1310 (7th Cir. 1992) 22

Illinois Central R. Co. v. Illinois, 146 U.S. 387, 13 S. Ct. 110 (1892) 15

Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979) 13, 21, 29

Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984) 21

Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L.Ed. 159 (1891) 21

Martin v. Waddel, 41 U.S. 367, 10 L.Ed. 97 (1842) 7

McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1877) 21

McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628 (La.1902) 16

McGilvra v. Ross, 215 U.S. 70, 30 S. Ct. 27, 54 L.Ed. 95 (1909) 14

Moore v. Hampton Roads Sanitation, 557 F.2d 1030 (4th Cir. 1976), cert. denied, 434 U.S. 1012, 98 S. Ct. 725 (1978) 21

TABLE OF AUTHORITIES – Continued

Page

Ne-Bo-Shone Association v. Hogarth, 7 F. Supp. 885 (W.D. Mich. 1934) 24

New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District, 874 F.2d 1019 (5th Cir. 1989) 19

Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L.Ed.2d 550 (1977) 14

People For Open Waters, Inc. v. Estate of Gray, 643 So.2d 415 (La. App. 3rd Cir. 1994) 26

Phillips Petroleum Company v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L.Ed.2d 877 (1988) 10, 15, 24, 26, 28

Pollard's Lessee v. Hagen, 44 U.S. 212, 11 L.Ed. 565 (1845) 14, 18

Port of Seattle v. Oregon & W.R. Co., 255 U.S. 56, 41 S. Ct. 237 (1921) 9

Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 458, 38 L.Ed. 331 (1894) 8, 14, 19

Smith v. Maryland, 18 How. 71, 15 L.Ed. 269 (1855) 21, 23

State v. Barras, 615 So.2d 285 (La. 1993) 4, 18, 27

State v. Danzy, 527 So.2d 68 (La. App. 3rd Cir. 1988) 17

State v. Richardson, 140 La. 329, 72 So. 984 (1916) ..3, 26

State v. Sweet Lake Land and Oil Co., 164 La. 240, 113 So. 833 (La. 1927) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S. Ct. 548 (1940) 21

United States v. Cress, 243 U.S. 316, 37 S. Ct. 380 (1917) 14

Vaughn v. Vermilion Corporation, 444 U.S. 206, 100 S. Ct. 399, 62 L.Ed.2d 365 (1979) 12, 13, 29

Warner v. Clarke, 232 So.2d 99 (La. App. 2d Cir. 1970) 26

Weber v. Commissioners, 18 Wall. 57 (1873) 14

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) 22

STATUTES

33 U.S.C. §10 17

43 U.S.C. §1311 22

43 U.S.C. §1314 22

43 U.S.C. §981 et seq. 16

Act of February 20, 1811, 2 Stat. 642 17

Act of March 2, 1849, C. 87, 9 Stat. 352 16

Act of September 28, 1850, C. 84, 9 Stat. 519 16

La. Act 160 of 1900 16

La. Act 18 of 1894 16

La. Act 205 of 1910 16

La. Act 74 of 1892 16

La. Civil Code Article 3413 27

TABLE OF AUTHORITIES – Continued

Page

La. Civil Code Article 456 ..... 3, 27

La. R.S. 9:1115.1 26

La. R.S. 9:1101 12

La. R.S. 41:1701 12

La. Admin. Code 76: VII.177 5

OTHER AUTHORITIES

"The Right to Take Fish and Game in Navigable, Non-Tidal Waters," 27 Harvard Law Review 750 (1914) 24

A.N. Yiannopoulos, La. Civil Law Treatise, Vol. 2, Property, §§56-61, 85 (3rd Ed., 1991) 27

Hargrave, "The Public Trust Doctrine: A Plea for Precision," 53 La. Law Rev. 1535 (1993) 26

Louisiana State Law Institute's Advisory Legal Opinion Relative to Non-Navigable Waterbottoms, 53 La. Law Rev. 35 (1992) 12, 26

Madden, Federal and State Lands in Louisiana (1973) 16

Opinion of the Attorney General of the State of Louisiana No. 88-649 27

Submerged Lands Act, House Report No. 215 to accompany H.R. 4198, Appendix I, 83d Cong., 1st Sess. (1953), reprinted in 1953 United States Code Congressional and Administrative News 1385 at 1426-1437 12

STATEMENT OF THE CASE

Introduction

Respondents Williams, Inc. ("Williams") and Atchafalaya Crawfish Conservation Association ("ACCA"), sometimes hereinafter referred to collectively as the "Landowners," jointly file this brief in opposition to the petition for review filed by Charles R. Blanchard, Sr. ("Blanchard") and West Louisiana Crawfish Producers Association, Inc. ("Producers"), sometimes hereinafter collectively referred to as the "Crawfishermen."

The Crawfishermen instituted this proceeding seeking a declaratory judgment fixing the extent and nature of their rights to commercially crawfish on privately-owned swamplands comprising in excess of 95,000 acres situated within the Atchafalaya Basin of Louisiana. The Crawfishermen also claimed that the Landowners' acts of posting, patrolling and threatening trespass actions in these contested areas were illegal and sought to enjoin the Landowners from interfering with the alleged public rights to crawfish in these areas.

Asserting federal question jurisdiction of the matter, the Crawfishermen claim that there are federally protected fishery rights in these areas and that they are protected under the Civil Rights Act from posting and threatening enforcement of state criminal trespass laws which may operate to preclude them from their alleged public right to use and enjoy these lands for their crawfishing activities. The Crawfishermen further alleged pendent jurisdiction of state property law claims to crawfish in the contested areas.

Williams is an owner of lands within the Atchafalaya Basin, some of which are leased to others for commercial crawfishing. ACCA is a corporation which has as its principal business the conduct of commercial crawfishing operations on lands leased from others, including Williams. The Landowners deny that lands they own or lease

are subject to any public right of access or use for commercial crawfishing purposes. The Landowners filed a motion for summary judgment. Finding no basis in federal law for the rights claimed by the Crawfishermen, the United States District Court for the Western District of Louisiana issued a memorandum ruling and final judgment in favor of the positions asserted by the Landowners, granting the motion for summary judgment and dismissing the Crawfishermen's claims, without prejudice to their right to pursue their state law claims in the state courts of Louisiana.

On appeal by the Crawfishermen asserting the same federal rights claimed on this petition for review, the United States Court of Appeals for the Fifth Circuit affirmed the District Court judgment, finding no reversible error. The Fifth Circuit did not designate its opinion for publication, implicitly recognizing that the case was decided on the basis of well-settled principles of law and concerned no legal issues of significant public interest. See 5th Cir. R. 47.5.

Statement of Facts

Contrary to the suggestions contained in the Crawfishermen's petition to this Court, the area in controversy is not a large navigable waterway fished by these Crawfishermen or their ancestors since time immemorial. The area in controversy is swampland situated entirely within the Atchafalaya Basin Floodway (the "Floodway"). The Floodway is a vast area more than 130 miles long which contains a network of channels, lakes and forested swamps. There are interstate highways which cross the Floodway and state roads which exit the interstate and provide access to trailer parks and campsite developments which exist throughout the Floodway. Guide levees now artificially define the area directly affected by the Floodway's major water course, the Atchafalaya River.

The area in controversy consists of about 95,000 acres of privately owned land located in the lower regions of

the Floodway. The Crawfishermen claim no ownership interest in these lands. The majority of these lands were originally acquired by the State of Louisiana from the United States as swamp and overflowed lands pursuant to the Swamp Land Grants of 1849 and 1850, prior to transfer by the State into private ownership.

Moreover, the area claimed by the Landowners and over which dominion is being exercised does not extend below the level of ordinary low water.[1] Not only are the activities of the Crawfishermen occurring within the forested privately owned portions of the Floodway, those activities require the actual use of the privately owned bottom and/or privately owned timber resources. The activities for which the Crawfishermen seek federal protection are neither traditional fishing activities nor acts of navigation. Rather, those activities, which require the placement of traps on the bottom of the swamp for weeks at a time and further require the anchoring of the trap to a tree or stake embedded in the soil, constitute impediments to navigation.

Throughout this proceeding, the Crawfishermen have attempted to mask their claims as an effort to recognize a public right to navigate on and use waterways. Their claims, however, have nothing to do with rights of

---

[1] The area between ordinary low water and ordinary high water on rivers and streams is defined in Louisiana law as the "bank." La. C.C. art. 456. The bank along the riparian swampland, pursuant to Louisiana law, is privately owned. Ibid.; see also *State v. Richardson*, 140 La. 329, 72 So. 984 at 990-991 (1916). The pleadings in this litigation and the Statement of Material Undisputed Facts filed in connection with the motion for summary judgment confirm that the activities of the Crawfishermen occur above ordinary low water.

navigation on waterways; rather, they seek a public right to access and use private swampland, to tie boats and nets to trees growing on those lands and to otherwise conduct commercial crawfishing operations thereon.[2]

In 1990, ACCA embarked on a legitimate business venture of leasing private property for the purpose of engaging in commercial crawfishing activities. Many crawfishermen participated in its leasing/permit program. In order to protect its property rights and those of its permittees, ACCA, through its representatives, brought trespass complaints under Louisiana state law against crawfishermen placing traps on these private lands without permission who refused after several requests to obtain permits or cease crawfishing on the private swamplands. In both lower courts, these petitioners advanced a groundless civil rights complaint founded on a naked claim that the District Attorney of Iberia Parish "presumptively" agreed to prosecute individuals pursuant to ACCA's enforcement of its leasing program and carried out that concerted plan to their detriment.[3] That claim was properly dismissed by the courts below and has been abandoned by the Crawfishermen in this petition for review.

---

[2] Thus, contrary to the question for review posed by the Crawfishermen in their petition to this Court, the real issue in this case, as recognized by the District Court, is whether federal law permits the public at large to conduct commercial crawfishing activities on privately-owned waterbottoms accessible from navigable waters.

[3] In fact, only one prosecution has been pursued by the District Attorney's office on complaint of a Williams, Inc. lessee on lands in controversy in this proceeding outside the ACCA area, *which prosecution was affirmed as legally proper in the state courts of Louisiana*. See *State v. Barras*, 615 So. 2d 285 (La. 1993). Five arrests made on complaint of ACCA in the area in controversy have not been prosecuted beyond bill of information to date.

Finally, it should be noted that behind this effort to convert private property rights of the Landowners into free public domain are the Crawfishermen's objections to permit fees, seasonal limitations on crawfishing use and the imposition of *statutorily-required* mesh size restrictions on the crawfishing activities allowed on these private swamplands by the Landowners in order to conserve and manage the crawfish resource. Since the inception of this litigation, the State of Louisiana through its Department of Wildlife and Fisheries has imposed similar limitations upon publicly owned swamplands within the Sherbourne Wildlife Management Area of the Floodway in Iberville Parish north of the acreage in dispute in this proceeding. Emergency regulations adopted May 4, 1995 include provisions which close certain tracts of recently forested land to crawfishing, set a crawfish season on the remainder of the property, require a crawfish permit and set a fee therefor and restrict use of motor boats on some of the property (which often occasion damage to the levees and small trees requiring expensive repair). See La. Admin. Code 76: VII.177, reprinted at Volume 21 Louisiana Register No. 5. These regulations were deemed necessary due to the negative impact on wildlife and timber resources from unregulated commercial and recreational crawfishing on the public property. These regulations further demonstrate that, as properly recognized by the courts below, crawfishing is an inherently land-based activity which not only requires use of waterbottoms but often occasions damage to private land resources.

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit in this matter affirms a United States District Court finding that no federal law confers a public right to crawfish on privately-owned swampland accessible from navigable water, a property law question dictated by state law and properly resolved in the state courts of Louisiana. That decision creates no conflict with

any other United States Circuit Court of Appeals' decision or with any relevant decision of this Court. It involves no conflicting principles of federal law, the settlement of which is of importance to the public.

In their effort to create a federal right where none exists, the Crawfishermen invoke ancient principles of English law and the Magna Charta, attempt to impress property law principles of other states upon Louisiana under the guise of federal common law and to transform statehood acts intended to assure that navigable waterways remain free *highways* of transportation among the citizens of the states into a federal right in the public to create commerce from the private property of others. At the same time, they ignore modern pronouncements of the United States Supreme Court and of the Congress of the United States, of the Louisiana Supreme Court and of the Legislature of the State of Louisiana which recognize that crawfishing rights on privately owned swamplands are matters of state property law.

As indicated by the argument which follows and by the disposition of this case by the Fifth Circuit below, there is no compelling reason for this Honorable Court to review this case on writ of certiorari inasmuch as the decision of the lower courts comports with settled federal law, specific Congressional legislation and over a century of Supreme Court pronouncements.

ARGUMENT AND AUTHORITIES

1. THERE IS NO RIGHT UNDER FEDERAL LAW TO CRAWFISH ON PRIVATELY OWNED SWAMPLAND ACCESSIBLE BY BOAT FROM NAVIGABLE WATERS. THE FIFTH CIRCUIT DECISION IN THIS REGARD IS CONSISTENT WITH A LONG HISTORY OF JURISPRUDENCE FROM THIS COURT.

The Crawfishermen argue that questionable principles of English common law[4] have become federal common law impressing upon Louisiana's civil law of property a federal right to crawfish on privately owned lands beneath navigable waters. A long line of jurisprudence from this Court and specific Congressional legislation clearly reject such a notion.

In *Martin v. Waddel*, 41 U.S. 367, 10 L.Ed. 97 (1842), cited by the Crawfishermen, the Court had this to say:

> We do not propose to meddle with the point which was very much discussed at bar, as to the power of the King, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. . . . And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. *For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject*

---

[4] Note Justice Thompson's dissent in *Martin v. Waddel*, 41 U.S. 367 at 418-434.

> *only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to the grants of the British Crown, when the title is held by a single individual, in trust for the whole nation.* See 41 U.S. 367 at 410-411 (emphasis added).

In *Hardin v. Jordan*, 140 U.S. 371, 11 S. Ct. 808, 35 L.Ed. 428 (1891), the Court observed, with respect to title to and use of state sovereignty lands:

> Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. *The state may even dispose of the usufruct of such lands, as is frequently done by leasing the oyster beds in them, and granting fisheries in particular localities;*. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, *state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce* and in subjecting the lands to the necessities and uses of commerce. . . . *but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.* See 140 U.S. 381, 382 (emphasis added).

In *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331 (1894), the Court clarified the nature of the so-called "public trust" or "equal footing" title by which the federal government held territory like that of Louisiana prior to its admission to statehood, observing that:

> The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters,

> and in the lands under them, within their respective jurisdictions. *The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.*
>
> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tidewaters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of *leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states,* respectively, *when organized and admitted into the Union.* See 152 U.S. 1, 57-59 (emphasis added).

In *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 41 S. Ct. 237 (1921), Justice Brandeis, speaking for a unanimous Court, stated:

> The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. . . . The character of the state's ownership in the land and in the waters is the full proprietary right. *The state, being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the state of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same is a matter*

> *wholly of local law. Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331. *Upon such questions the provisions of the Constitution and statutes of the state and the decisions of its highest court are accepted by us as conclusive.* 255 U.S. 56 at 63 (emphasis added).

Finally, in its most recent pronouncement on the subject, this Court, after a lengthy review of the history of law in this area, stated in *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L.Ed.2d 877 (1988), that:

> . . . But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit. [citing *Shively v. Bowlby*]. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13 – more private interests than were recognized at common law, or in the dictates of our public trust cases.
>
> . . . many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here. See 484 U.S. 475-476, 483.

Consistent with this long history of Supreme Court pronouncements, the Congress of the United States in 1953 confirmed the ownership and dominion of the States to the lands beneath navigable waters within their respective boundaries and of the fisheries resources therein, declaring in the Submerged Lands Act that:

> "Title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and *the right and power to manage*, administer, *lease*, develop, *and use the said lands and*

> *natural resources all in accordance with applicable State law* be, and they are hereby, subject to the provisions hereof, recognized, *confirmed*, established, invested in and assigned *to the respective States or the persons* who were on June 5, 1950 *entitled thereto under the law of the respective States in which the land is located*, and the respective grantees, lessees or successors in interest thereof;" See 43 U.S.C. §1311(a).

"Natural resources" is defined at Section 1301(e) to include fish, shrimp, oysters, crabs, lobsters and other marine animal life. The legislative history of the Submerged Lands Act contains the following observations with respect to the Congressional intent:

> The earliest assertions by the States of proprietary rights in their submerged lands arose in connection with the regulation of fishing. Except in a few instances, where international treaties were involved, State control of fishing in navigable waters, within the State's boundaries, has been exclusive. The principal basis for this right to control fishing rests upon the proprietary rights of the State to the waters and the soil thereunder.
>
> * * *
>
> The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.
>
> * * *
>
> *State control of fishing, especially for sedentary fish, such as shrimp, oysters, clams, crabs, lobsters, etc., has been based upon the State's ownership of the*

> *soil.*[5] Regulations by many States are based upon the statutory declaration of the state's ownership of the waters and the fish in them. (emphasis added)
>
> * * *
>
> The uses to which these lands are put are essentially local in character, and are of primary concern to the people of the particular locality. Any conflict of interests arising from the use of the submerged lands should be and can best be solved by local authorities. See *Submerged Lands Act*, House Report No. 215 to accompany H.R. 4198, Appendix I, 83d Cong., 1st Sess. (1953), reprinted in 1953 United States Code Congressional and Administrative News 1385 at 1426-1437.

The suggestion by the Crawfishermen of a conflict with the decision of this Court in *Vaughn v. Vermilion Corp.*, 100 S. Ct. 399 (1979), is wholly without merit. The *Vaughn* decision is inapposite as a matter of fact and law. It involved an alleged right of public access to private navigable canals for travel and fishing. On the questions certified for review, this Court held that (1) although channels built on private property with private funds ultimatly join with other navigable waterways, *no general right of use in the public arises by reason of the authority over navigation conferred upon Congress by the Commerce Clause* of the Constitution and (2) if, however, the construction

---

[5] La. R.S. 9:1101 declares Louisiana's ownership of navigable waters and the beds thereof not under the direct ownership of any person on August 12, 1910, and its right to the possession of same, subject only to the paramount right of the United States to control *navigation* on such waters. See, generally, 53 Louisiana Law Review 35 at 43-77. Note also that La. R.S. 41:1701 recognizes the public fishery interests of the State in, and its management authority over, *state-owned* navigable *waterbottoms*.

of the artificial waterways destroyed the navigability of the surrounding natural waterways, they could become substituted therefor and subject to public use under the limitations and guidelines established by the Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332.

In this litigation, the Crawfishermen admit in their complaint that none of the waterbottoms at issue are private canals which destroyed former navigable waterways and that crawfishing and other commercial fishing is not done to any significant extent in canals. Moreover, the use of the private waterbottoms was not at issue in *Vaughn*.

There is no federal statutory or common law right to crawfish on private property beneath navigable waters within the State of Louisiana. On the contrary, the jurisprudence of this Court and federal statutes confirm that these are matters of individual state law and policy.

2. NO INDIVIDUAL FEDERAL RIGHTS ARISE UNDER THE "PUBLIC TRUST" OR "EQUAL FOOTING" DOCTRINE. MOREOVER, THAT DOCTRINE HAS NO APPLICATION TO VIRTUALLY ALL OF THE PROPERTY IN DISPUTE IN THIS LITIGATION WHICH WAS ACQUIRED BY THE STATE OF LOUISIANA, NOT BY RIGHT OF INHERENT SOVEREIGNTY UPON ADMISSION TO STATEHOOD, BUT BY GRANTS FROM THE UNITED STATES GOVERNMENT AS SWAMP AND OVERFLOWED LANDS OR LANDS OTHERWISE ABOVE THE LIMITS OF HIGH WATER, AND LATER CONVEYED BY LOUISIANA INTO PRIVATE OWNERSHIP.

A. No Individual Federal Rights Arise Under the Public Trust or Equal Footing Doctrine

As previously noted, each state obtained ownership of and dominion over lands covered by tide waters and navigable waterbottoms within its limits at the time of

sovereignty, with the consequent right to use or dispose of any portion thereof subject to the right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. Upon statehood, the federal trust title was relinquished. See also *Pollard's Lessee v. Hagen*, 44 U.S. 212, 11 L.Ed. 565 (1845); *Weber v. Commissioners*, 18 Wall. 57 (1873); *McGilvra v. Ross*, 215 U.S. 70, 30 S. Ct. 27, 54 L.Ed. 95 (1909); *United States v. Cress*, 243 U.S. 316, 37 S. Ct. 380 (1917). A century ago, this Court, in examining the disposition of public use and ownership rights made by the respective States in waterbottoms acquired by right of inherent sovereignty, observed "that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interest of the public." See *Shively*, supra, 157 U.S. 1, at 26, 14 S. Ct. 548 at 557.

In *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 97 S. Ct. 582, 50 L.Ed.2d 550 (1977), this Court rejected the application of federal common law to determine ownership rights in waterbottoms acquired by the State of Arizona upon its admission to the Union, observing that once the equal footing doctrine vested title in the States, upon their admission to the Union, in the lands underlying navigable waters within their boundaries, the force of the doctrine was spent. Citing *Pollard's Lessee v. Hagen*, the Court affirmed the absolute title of the states to the beds of navigable waters, "which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating." Citing *Shively v. Bowlby*, the Court affirmed that the title and rights of riparian proprietors in the soil below the high water mark is governed by the laws of the several states, subject only to the rights

granted to the United States by the Constitution, under which Congress by virtue of its commerce power possesses a navigational servitude with respect to navigable waters for the purpose of regulating and improving navigation. The Court also affirmed that riparian rights in the banks and shores of waterways are governed not by federal law but rather by the laws of the several States, citing with approval its observation in *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1877), that if the States choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

In *Appleby v. City of New York*, 271 U.S. 364, 46 S. Ct. 569 (1926), the Court expressly recognized that the power of a state to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself, is a state question to be determined from the law of the state at the time the deeds to the property were executed. Commenting specifically with regard to the Court's earlier decision in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892), the Court affirmed that the public trust doctrine does not impose any limitation upon the power of a state to dispose of public trust property as an incident and part of its sovereignty, whether the disposition be in full ownership or subject to public easement, provided the disposition is reasonable and can fairly be said to be for the public benefit or without substantial impairment of the public interest in the lands and the waters remaining. See 271 U.S. 364 at 393-395, 46 S. Ct. 569 at 578.

In its recent re-examination of the public trust doctrine in *Phillips Petroleum v. Mississippi*, supra, the Court reaffirmed its long-established rule that the individual States have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit. There is accordingly no federal right which may be claimed by these Crawfishermen under a

federal public trust doctrine to fish in the areas in dispute, those rights being dictated by state law and policy.

B. The Vast Areas of Swamp and Overflowed Lands In Which the Crawfishermen Claim Public Use Rights in This Proceeding Are Unaffected by the Public Trust Doctrine

Moreover, the vast areas of swamp and overflowed lands within the high water areas claimed by these plaintiffs were not acquired by the State of Louisiana by right of inherent sovereignty under the equal footing or public trust doctrine. Many of these lands passed directly into private ownership *after Louisiana statehood by grant from the United States* as public lands above the limits of high water. Most were transferred by the United States to the State of Louisiana after its admission to the ends of private reclamation and development under the federal swamp land grants of 1849 and 1850.[6] The very purpose of these grants was to aid the State of Louisiana, *through the revenues to be generated by the sale and subsequent taxation of such lands,* in constructing the necessary levees and drains to protect the valuable agricultural lands, plantations and settlements along the Mississippi River and its major distributaries from annual floods and to reclaim the swamp and overflowed lands within the State. See Act of March 2, 1849, C. 87, 9 Stat. 352 and Act of September 28, 1850, C. 84, 9 Stat. 519; see 43 U.S.C. §981 et seq.; see also La. Acts 74 of 1892, 18 of 1894, 160 of 1900 and 205 of 1910; and Madden, Federal and State Lands in Louisiana (1973) at pages 291-296. The Crawfishermen do not and cannot challenge the disposition of these lands by the State of Louisiana as public lands above the limits of

---

[6] In *McDade v. Bossier Levee Board,* 109 La. 625, 33 So. 628 (La. 1902), the Louisiana Supreme Court affirmed that even permanently overflowed swamps, or so-called shallow lakes, were included within the federal swamp land grants.

high water which were susceptible to private ownership. See *Chauvin v. Louisiana Oyster Commission*, 121 La. 10, 46 So. 38 (La. 1908); *State v. Sweet Lake Land and Oil Co.*, 164 La. 240, 113 So. 833 (La. 1927) and *State v. Danzy*, 527 So.2d 68 (La. App. 3rd Cir. 1988), writ denied.

3. THE ACT OF ADMISSION OF LOUISIANA INTO THE UNION RECOGNIZED MERELY THE RIGHT OF FREE PASSAGE UPON THE MISSISSIPPI RIVER AND OTHER IMPORTANT NAVIGABLE STREAMS AND WATERWAYS WHICH BECAME STATE-OWNED BY RIGHT OF SOVEREIGNTY IN 1812 AND ESTABLISHED NO FEDERAL RIGHT OR INTEREST IN SUCH WATERWAYS SAVE THAT SURRENDERED TO THE UNITED STATES GOVERNMENT UNDER THE CONSTITUTION.

The Crawfishermen argue that under the Act of Admission of 1812, they have a federally conferred civil right to crawfish on the Landowners' property.[7] The Act for the admission of Louisiana into the Union included the provision "that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states in the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state." Act of February 20, 1811; see 2 Stat. 642; see also 33 U.S.C. §10.

From the simple, unambiguous language of the Act, it is clear that the enjoyment of navigable waters leading

---

[7] Faced with the absence of any express or otherwise reasonable suggestion of fishing rights within the language of this statute, the Complaint by these Crawfishermen inferred that this Act created a *federal navigational servitude which protects public fishery rights*, although they later disclaimed any dependency of fishing rights on navigational uses.

to the Mississippi River and the Gulf of Mexico as "common highways" contemplates nothing more than the enjoyment of the water for purposes of navigation – of passing and repassing, as a public highway, like a public highway on land. It is *not* the use of the waterbodies *for any public purpose* but for purposes of navigation and such other uses as are incident to the enjoyment of the water body as a public highway. That enjoyment creates no rights or benefit in the public to the soil of the navigable stream, which remains subject to any lawful private or public control or use as does not impede or interfere with the use of the water body as a public highway. Crawfishing, as manifested in the deposition testimony of petitioner Blanchard and acknowledgments of his counsel,[8] is an activity which peculiarly takes place on the bed or soil of the waterbottom and requires the anchoring of a trap to a tree, stake or other potential obstruction to the use of the waters as a public highway in navigation. Thus, waterbottom areas susceptible to crawfishing are inherently insusceptible to use as public highways within the intent of the Act of Admission.

A similar provision to Louisiana's Act is found in the compact entered into between the United States and Alabama as a condition of its admission into the Union. That compact was interpreted by this Court in *Pollard's Lessee v. Hagen*, supra, as creating no federal power or right, but as merely evidencing the regulatory authority over commerce given to the United States under the Constitution. The Court affirmed the exclusive right of sovereignty in the States to dispose of or otherwise regulate use and enjoyment of the shores and soils under navigable waters within their respective jurisdictions, subject only to the power conferred upon Congress under the Commerce

---

[8] See the stipulation by the Crawfishermen noted at page 16 of the Memorandum Ruling of the District Court in this proceeding, appended to the writ petition herein. Note also *State v. Barras*, 615 So.2d 285 at 287.

Clause of the United States Constitution. Thus, as a matter of federal law, the Act of Admission confers no greater right in those navigable waters within the State of Louisiana to which it applies, than exists under the Commerce Clause authority which, as addressed below, creates no individual federal rights in the Crawfishermen to fish in the contested areas.

Shively, supra, and *Burns v. Crescent City Rod & Gun Club*, 41 So. 249 (La. 1906), cited by the Crawfishermen as recognizing a public trust fishery right implemented under authority of the Act of Admission, are inapposite. *Shively*'s references to the various acts establishing territorial government or admitting states into the Union reflect merely the design to preserve navigable waterways as public or common highways. *Burns* makes no mention of public trust fishing rights (since none exist) and cites the Act of Admission only in passing without any holding thereon. More importantly, *Burns* ties the right to fish upon a determination of whether the waterbodies were navigable *and* state-owned (i.e., "it is because navigable rivers afford a way of communicating that the legislature has placed them in the public domain"), as to which only one of the waterbodies at issue in that case qualified.

New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District, 874 F.2d 1019 (5th Cir. 1989) is similarly inapposite, the authorities relied upon in that decision clearly indicating that the Act's proscription of duties, imposts or tolls relates solely to the privilege of *navigating* through the waters to insure a highway equally open to all. See *Hampton v. Vicksburg, S & P.R., Co.*, 119 U.S. 280, 285, 7 S. Ct. 206, 208 (1885); *Cardwell v. American Bridge Company*, 113 U.S. 205, 5 S. Ct. 423 (1885); *Escanaba Company v. Chicago*, 107 U.S. 678, 2 S. Ct. 185 (1883).[9]

---

[9] Furthermore, *Dardar v. Lafourche Realty*, supra, determined that the Act of Admission does not apply to all

4. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO FISH ON PRIVATELY OWNED SUB-AQUEOUS LAND, EVEN IF NAVIGABLE-IN-FACT TO COMMERCIAL CRAWFISHERMEN.

It is settled law that the ownership of, and dominion and sovereignty over, navigable waterbottoms within the limits of the states belong exclusively to the respective States in which they are found, including the right to recognize private rights in such lands as each state sees fit, subject only to the paramount right of Congress to control their *navigation* so far as may be necessary for the regulation of commerce among the states and with foreign nations. See authorities previously cited herein. Clause 3 of Section 8 of Article 1 of the Constitution recognizes that Congress shall have the power to regulate commerce with foreign nations and among the several states. Congress possesses by virtue of its commerce power a navigational servitude with respect to navigable waters for the purpose of regulating and improving navigation.[10] See *Gibson v. United States*, 166 U.S. 269, 17 S. Ct. 578, 41 L.Ed. 996 (1897). The exercise of the Commerce Clause authority of Congress is, in turn, subject to the prohibition of the Fifth Amendment of the United States

---

waterways leading to the Gulf of Mexico, but only to waterways which were navigable in fact at the time of its enactment in 1812. The statute was also never intended to apply to waterways only capable of an imperfect navigation in times of floods and very high water. See *Boykin & Lang v. Shaffer*, 13 La. Ann. 129, 130-131 (1858).

[10] The removal of any obstruction to navigable waters of the United States lies within the authority delegated by Congress to the United States Army Corps of Engineers. *California v. Sierra Club*, 101 S. Ct. 1775 (1981), affirmed that the Congressional prohibition against obstruction of navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899 does not confer a private right of action to contest such obstructions.

Constitution against the taking of private property for public use without compensation. See *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979).

Precedents of the United States Supreme Court also recognize that while the title of each State in the beds of navigable and tide waters within its jurisdiction is subject to a paramount right of navigation granted to the United States for the regulation of foreign and interstate commerce, federal Commerce Clause authority does not preempt the substantial proprietary interest of a state in the control of fisheries and other natural resources within its boundaries, except to preclude state restrictions which discriminate in favor of its own citizens and against those of other states or which violate a federal statute or treaty on the subject. See *Smith v. Maryland*, 59 U.S. 71, 15 L. Ed. 269 (1855); *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877) [regarding the authority of Virginia to regulate oyster cultivation in its tidal rivers: "[T]here is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."]; *Manchester v. Massachusetts*, 139 U.S. 240, 11 S. Ct. 559, 35 L.Ed. 159 (1891); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977); note also *Moore v. Hampton Roads Sanitation*, 557 F.2d 1030 (4th Cir. 1976), cert. denied [harvesting of oysters from leases issued by Virginia is a purely local activity subject to Virginia state law, as recognized by Congress in the Submerged Lands Act] and *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984) [the federal navigational servitude under the Commerce Clause does not include public fishing rights, a matter governed by state law].

While *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 548 (1940) indicates that the Commerce Clause power of the United States over navigable waters is not limited to control for navigation and can

include such interests as flood protection, watershed development and the production of power, the express reservation of these rights in the Submerged Lands Act [see 43 U.S.C. §1311(d)], coupled with the express confirmation of the authority of the States over shell-fish cultivation and harvesting in the same Act [43 U.S.C. §1311(a)], leaves beyond question the conclusion that no individual federal fishing rights under the Commerce Clause or other provision of the United States Constitution were contemplated to exist either in 1953 or today. Thus, Section 1314 of the Act declares that the United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources* which are specifically recognized, confirmed and vested in and assigned to the respective States *and others* by Section 1311.

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cited by the Crawfishermen to suggest a Commerce Clause public fishing right, is not only distinguishable on its facts (no fishing interest at issue or considered by the Court) but its conclusion that the Commerce Clause authority extends to regulating use of private submerged riparian property *for conservation purposes* (i.e., to protect wildlife) because "the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce" has been properly criticized as perfunctory dicta made without any analysis and accordingly should be given no weight. See *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A.*, 961 F.2d 1310 at 1321 n. 8 (7th Cir. 1992). Moreover, the Commerce Clause application suggested by the Crawfishermen would completely emasculate the express provisions of the Submerged Lands Act.

Neither the Commerce Clause nor the 14th Amendment[11] of the United States Constitution confers any right upon an individual citizen to fish on privately owned subaqueous land within the boundaries of the State of Louisiana. Neither Louisiana's property law nor the use and protection by these Landowners of their private property rights violates any federal law or treaty or discriminates against citizens of another state or otherwise impairs any federal interest in interstate commerce. In fact, federal law (including Supreme Court jurisprudence) specifically sanctions the private property rights and interests of these Landowners under Louisiana state law.

5. THE RIGHT TO CRAWFISH IS A PROPERTY RIGHT INCIDENT TO THE OWNERSHIP OF THE LAND AND DOES NOT FOLLOW FROM ANY PUBLIC RIGHT OF PASSAGE ON WATERS, EVEN IF NAVIGABLE, WHICH MAY FLOW OVER PRIVATELY OWNED LAND.

The Crawfishermen's naked claim that public trust fishing rights are a protected use of navigable waters *independent of land ownership* is contradicted by the very authorities which they cite in support of their alleged rights. *Smith v. Maryland* notes that, among the possible state interests, "public trust *lands* may be used for fishing for both shell-fish [and] floating fish" and observes that "the *soil* [below the low water mark] is held by the state for the enjoyment of certain public rights, among which is the common liberty of taking fish." See also *Hardin v.*

---

[11] *The Slaughterhouse Cases*, 16 Wall.36, 83 U.S.36 (1873), lend no support to the rights claimed by the Crawfishermen. The dicta cited by the Crawfishermen bears neither the meaning (i.e., "use" = "fish") nor weight (i.e., established a constitutional right to fish) ascribed by them to that decision.

Jordan and particularly *Phillips v. Mississippi*, cited to recognize a state's public trust interest *in lands beneath tidal waters* for uses not related to navigability such as *fishing*, bathing, swimming, recreation and mineral development.

Even the 1934 Michigan property law decision cited by the Crawfishermen to support the independent nature of the right to fish from the right of navigation [*Ne-Bo-Shone Association v. Hogarth*, 7 F. Supp. 885 at 889-890] supports that observation by reference to a 1914 Harvard Law Review article entitled "The Right To Take Fish and Game in Navigable Non-Tidal Waters," which affirms that the right to fish in navigable waters is properly an incident of the land ownership:

> "While no one can obtain absolute property in fish and game except by reduction to possession, and therefore their ownership while uncaptured does not go with the realty; *the right to take creatures ferae naturae*, transiently upon land, is recognized as a valuable property right incident to its ownership. So in ancient times, the right to fish in the sea was the exclusive prerogative of the King and lord of the soil; but either by Magna Charta, or by the gradual encroachment upon royal prerogative as the representative character became recognized, the King's right to the sea came to be regarded as held in trust for the public, and the right to fish became free and common to all. This right though arising independently of the public ownership of the soil, thus chanced here to be coextensive with the right of navigation. In English non-tidal streams, however, the exclusive right of fishery is in the riparian proprietor of the soil. Inasmuch as these inland waters are subject to a public easement of navigation, *it is clear that the right to hunt and fish has no connection with the right of navigation, but is an incident of the land.*

* * *

Not only is there no historical connection between the right to hunt and fish and the right of passage, but there is no basis on reason or analogy for the connection. Although other servitudes in the nature of easements may be annexed by custom or prescription to an easement of passage, the right to take fish and game cannot be thus annexed because it is not an easement but a *profit a' prendre*, which the public cannot acquire by customary or prescriptive user. Aside from annexed incidents, a public right of passage upon land includes only those rights reasonably necessary for the enjoyment of the easement. According one who uses a public way as a vantage ground for observing the training of horses in adjoining fields, . . . or shooting his game, becomes a trespasser upon the servient tenement. And one in the pretended exercise of an easement of navigation over privately owned subaqueous land, who takes ice from the surface or gravel from the bed of the stream is likewise clearly a trespasser. The argument that as fish and game have no owner, anyone has a right to take them wherever he has a right to be, is thus answerable in that the taker has no right on the highway for that purpose. On these grounds the majority of the courts have reached a result opposite to that of the principal case." See 27 Harvard Law Review, Page 750-752 (emphasis added).[12]

---

[12] Some states, like Michigan, pursued a different policy. Note *Collins v. Gerhardt*, cited by the Crawfishermen, in which the Michigan Supreme Court decided "that the common law doctrine, viz., that the right of fishing in navigable waters follows ownership of the soil, does not prevail in this state." The concurring opinion in that case also indicated that, even under

In Louisiana, the right to hunt and fish has always been regarded as a property right incident to the ownership of the land. As recently affirmed by the Louisiana State Law Institute and by the Louisiana Legislature in light of the *Phillips* pronouncements, navigability – not fisheries use – has been the hallmark of Louisiana's public trust interest in its sovereignty lands since statehood, public rights to hunt and fish being limited to public lands, including navigable waterbottoms which have remained under ownership by the State of Louisiana.[13] Furthermore, the idea that public navigation and fishery rights arises from the public nature of "running water" has been considered and rejected in the state courts of Louisiana and by the Fifth Circuit. See *Brown v. Rougon*, 552 So.2d 1052 (La. App. lst Cir. 1989), writ denied (recognizing that although subject to public use, the water running naturally in a private canal does not give the public the right to navigate and fish in the canal); *Amigo Enterprises, Inc. v. Gonzales*, 581 So.2d 1082 (La. App. 4th Cir. 1991); *Dardar v. Lafourche Realty Co., Inc.*, No. 85-1015 (E.D. La. 1991), affirmed in part, vacated in part and remanded, 985 F.2d 824 at 834 (5th Cir. 1993); *People For Open Waters, Inc. v. Estate of Gray*, 643 So.2d 415 (La. App. 3rd Cir. 1994). Louisiana courts have also consistently recognized that the public at large enjoys no right of access for fishing on private land simply because that land becomes flooded by a navigable stream. See *State v. Richardson*, 72 So. 984 (La. 1916); *Warner v. Clarke*, 232

Michigan law, no public trust fishing rights affect swamplands acquired under the Swamp Lands Acts which are overflowed so as to be covered by navigable waters. Note also the *Collins* dissent. See 211 N. W. 115 at 118, 123-128.

[13] See the Louisiana State Law Institute's Advisory Legal Opinion Relative to Non-Navigable Waterbottoms, 53 La. Law Rev. 35 at 66-67 (1992); La. R.S. 9:1115.1; Hargrave, "The Public Trust Doctrine: A Plea for Precision", 53 La. Law Rev. 1535 (1993).

So.2d 99 (La. App. 2d Cir. 1970), writ denied; *Edmiston v. Wood*, 566 So.2d 673 (La. App. 2d Cir. 1990); see also La. Civil Code Article 3413; official comment (b) to La. Civil Code Article 456, as revised in 1978; Louisiana Attorney General Opinion No. 88-649; A.N. Yiannopoulos, La. Civil Law Treatise, Vol. 2, Property, §§56-61,85 (3rd Ed., 1991).

State v. Barras, 615 So.2d 285 (La. 1993), considered the validity of trespass charges brought against two members of Producers for actively conducting commercial crawfish harvesting *on lands within the presently contested area of the Atchafalaya Basin* without permit and after being orally forbidden to remain on such lands. The lands involved were flooded swamp lands, inundated by waters of the Atchafalaya River and its distributaries for up to six months of each year with depths of water in the crawfishing areas ranging from 6" to 6', *the same characteristics alleged by the Crawfishermen over the other lands in controversy in this proceeding*. The crawfishermen claimed that the lands were public lands subject to public use. The Louisiana Supreme Court affirmed the trespass convictions, properly recognizing that the area in question was backwater swamp land within the Atchafalaya River's floodplain which did not, by its mere susceptibility to crawfish activity and navigation during flood conditions, become public navigable waters or render the private property subject to public use.

The shallow depth of legal analysis and historical perspective by these Crawfishermen is perhaps best exemplified in their attack on the Louisiana Supreme Court's *Barras* decision, referring to the Court's protection of the private nature of "flooded swampland" as "semantic legerdemain." The very fact that the United States government in 1849 and 1850 authorized the grant to Louisiana of all swamp and all overflowed lands within its borders for private sale to aid the State in constructing the necessary levees and drains to reclaim such lands indicates quite clearly that neither the federal nor state sovereigns ever considered flooded swampland

to be inalienable sovereignty lands affected by any notion of public trust right or interest and that both sovereigns fully intended all rights inherent in the private ownership of such lands to pass to the purchasers thereof.

The Submerged Lands Act expressly recognizes that the use of submerged lands beneath navigable waters of the United States for crawfishing was vested either in the State of Louisiana or the private individuals in ownership of the lands or the right to fish thereon as of the effective date of that legislation, negating any notion of a paramount federal statutory, common law or constitutional right or interest in that activity. This Court emphatically stated in *Phillips* that post-statehood public trust uses of sovereignty lands and waters are matters of state law and policy subject to the constitutional powers reserved to the federal government. Both specific Congressional legislation and long-standing pronouncements of this Court affirm the propriety of the Fifth Circuit and the District Court in dismissing this complaint as a matter of federal law.

CONCLUSION

The Crawfishermen are not concerned with any obstruction of their navigation in the major navigable bayous and streams which make up the Atchafalaya River system and its distributaries in this portion of the Floodway, as no such obstruction exists nor can any be shown by them.[14] They admit that their activities take place outside the beds of these bayous and streams. In essence, these Crawfishermen are asking the federal courts to declare vast areas of privately owned swampland to be subject to public crawfishing use as a matter of federal law in derogation of the aforestated principles of Louisiana law and of the titles and ownership rights

---

[14] See page 15 of the Memorandum Ruling of the District Court in this proceeding, appended to the writ petition herein.

lawfully transferred by the State of Louisiana and/or the United States government long ago to private parties.

Moreover, these Crawfishermen do not seek access to the many thousands of acres of overflowed swamp involved in this litigation for purposes of navigation as public highways in interstate commerce.[15] Only capable in part of an imperfect navigation for crawfishing uses when flooded at periods of high water, these tree-choked swamps are wholly insusceptible of use in navigation in interstate commerce in their ordinary condition. They have long been recognized as private property and were sold by the State of Louisiana and federal government as such. Accordingly, any attempt to recognize a general public right of access and use for crawfishing under the Commerce Clause of the United States Constitution would run afoul of the Fifth Amendment and amount to a taking of private property without compensation. See *Kaiser Aetna*, supra; *Vaughn*, supra; *Dardar v. Lafourche Realty*, supra. As recognized in *Kaiser Aetna*, the "right to exclude" is universally held to be a fundamental element of the right of private property, falling clearly within the category of interests that the government cannot take without compensation.

The issue of a public right to fish on privately-owned submerged land is not new. It has been raised, studied and addressed in numerous state and federal forums by legislators, legal practitioners, legal scholars and the

---

[15] The Landowners will contest whether these overflowed swamp lands are navigable in fact so as to be navigable in law should trial on the merits become necessary. For purposes of this motion only, the Landowners do not raise the fact issue of navigability, since even allowing the assumption that the overflowed swamp were navigable in fact to these Crawfishermen, federal law does not recognize a crawfishing right in the public on these submerged privately owned lands.

courts, all of which have reached the same conclusion – that the District Court and the Fifth Circuit were undeniably correct in finding no basis in federal law for the rights claimed by these Crawfishermen and dismissing the action for consideration by the state courts of Louisiana based upon state law and policy applicable to this property issue, should the Crawfishermen choose to advance their state law claims to these crawfishing rights.

The decision of the Fifth Circuit in this matter is grounded in well-settled principles of law which the Fifth Circuit has properly recognized concern no issues of significant public interest. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

PATRICK G. TRACY, JR. – 12888
600 Jefferson Street, Suite 910
Post Office Box 54001
Lafayette, Louisiana 70505-4001
Telephone: (318) 266-2340

Attorney for Williams, Inc.

NEWMAN TROWBRIDGE, JR. – 12930
BIGGS, TROWBRIDGE, SUPPLE
AND CREMALDI
Post Office Drawer 565
Franklin, Louisiana 70538
Telephone: (318) 828-5480

Attorney for Atchafalaya
Crawfish Conservation Association